



FOREIGN SERVICE GRIEVANCE BOARD

*Annual Report*  
*for the Year*  
**2003**





## FOREIGN SERVICE GRIEVANCE BOARD

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### **Annual Report for the year 2003**

#### ***Recipients***

**Committee on Foreign Relations  
United States Senate**

**Committee on International Relations  
United States House of Representatives**

**Director General  
Department of State**



## FOREIGN SERVICE GRIEVANCE BOARD

### Annual Report for the year 2003

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**Message  
From The  
Chairman**

*I am pleased to submit the Annual Report of the Foreign Service Grievance Board for 2003. This report is submitted under Section 1105 (f)(1) of the Foreign Service Act of 1980, as amended November 29, 1999. That law requires, at a minimum, statistical data, but I want to continue my practice of supplementing that which is necessary by contributing some narrative. The supplemental material describes the Board's activities during the year, its important decisions, and relevant decisions of the Federal Courts. Evident, I believe, is that we are continually mindful of our statutory obligation to "maintain a fair and effective system for the resolution of individual grievances that will ensure the fullest measure of due process for the Foreign Service" (Section 101(b)(4) of the Foreign Service Act of 1980, as amended.)*

*Members of the Board are appointed by the Secretary of State for a term of 2 years. Terms are renewable. Appointees are selected from recommendations of the various foreign affairs agencies and the American Foreign Service Association. The only statutory limitation placed on the size of the Board is that it shall have "no fewer than 5." Terms begin at the start of the fiscal year, October 1. For 2003 the Board consisted of 27 members through September 30, and of 18 members since then. This reduction seems traceable to two factors. First, a reduced workload. And second, the apparent desire for a turnover of membership because a large number of long-standing members were not reappointed.*

*Board membership is drawn from a pool of professionals from the labor relations field and former members of the Foreign Service. All members work on a part-time basis under contract. Continuity of operations is maintained by the full-time staff headed by the Executive Secretary.*

*Most, but not all, of our members reside in the general vicinity of our central location, State Annex 15 at 1800 N. Kent Street, Rosslyn, Virginia. Those residing out-of-town come to headquarters from time-to-time and are easily accessible by*

**Message  
From The  
Chairman**

*e-mail or telephone. Their out-of-town location has never presented any problem as it has long been standard practice to handle matters involving them by teleconference or e-mail.*

*The pace of grievances received last year was slightly below that of the prior year. This is consistent with the history of the last several years showing a downward trend in case receipts. This overall modest decline in the number of cases masks a significant decline in disciplinary cases. While there were 19 discipline cases appealed to the Board in 2002, only 7 came to the Board in 2003. Somewhat counteracting that decline in sheer numbers is the fact that the grievances we now encounter are less often routine and more likely to present increasingly complex issues.*

*Prevailing parties are, under our regulations 22 CFR 908.2, entitled to reasonable attorney fees to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under 5 U.S.C. 7701(g). (Section 1107(b)(5) of the Foreign Service Act, as amended.) Even though we have dealt with this authority for years, new and novel issues continue to crop up in the area of attorney fees.*

*The Board continues to meet periodically with the foreign affairs agencies we serve and with employee representatives. These gatherings allow us to maintain active discussion of current grievance procedures and to explore potential improvements of the process. The necessary independence of this Board has been honored by all the agencies we serve. The logistical support given by the Department of State has been excellent and appreciated.*

*Our goal is to fulfill our mission by the issuance of just, fair and prompt decisions on all matters presented to us. And I emphasize that this report accentuates only facts as opposed to containing recommendations.*

*Sincerely,*

*Edward J. Reidy*  
**Edward J. Reidy**

**Chairman**

**March 2004**



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### **Background and Recent Developments**

Under 22 CFR 904.2 the Board has wide authority to make what is known as a preliminary determination as to timeliness of a grievance, whether a complaint constitutes a grievance, "or any other issue whose resolution might avoid the necessity of further proceedings". More frequent use of this procedure has recently been made. By so doing, case processing is quickened.

A decade ago our Annual Report explained that grievances concerning Employee Evaluation Reports constituted "the greatest percentage by far" of the cases filed with us. While last year the number of disciplinary actions were nearly as frequent, 2003 showed a noticeable decline in disciplinary actions. By far, most grievances are filed by Department of State personnel. No surprise there because it is the largest of the agencies we serve.

The length of the time between when the record is closed and the issuance of a decision by the Board is the best indicator of our efficiency. That time period is entirely under our control. It continues to decrease.

Section 1102 limits grievances by former members only to the alleged denial of an allowance, premium pay, or other financial benefit to which the member claims entitlement under applicable law or regulation. These are not frequent.

Where deemed appropriate the Board will refer an issue to our outside legal counsel, the law firm of Bredhoff and Kaiser. Referral to that firm is limited to legal issues. We do not ask that firm how to decide cases.

### **Board Members, Executive Secretary and Staff**

Under Section 1105 of the Foreign Service Act of 1980, as amended (the Act), Congress established the Foreign Service Grievance Board, which consists of no fewer than 5 members who are independent, distinguished citizens of the United States. Well known for their integrity, they are not employees of the foreign affairs agencies or members of the Service. Each member -- as well as the Chairman -- is appointed by the Secretary of State for a term of two years, subject to renewal. Appointments are made from nominees approved in writing by the agencies served by the Board and the exclusive representative for each such agency. The Chairman may select one member as a deputy who, in the absence of the Chairman, may assume the duties and responsibilities of that position. The Chairman also selects an Executive Secretary, who is responsible to the Board through the Chairman.

#### **As of January 1, 2003,**

**Edward J. Reidy** was the *Chairman of the Board* and he selected

**Edward A. Dragon** as *Deputy*.

**Don Cooke** was *Executive Secretary*.

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### **Members of the Board for 2003**

**Edward J. Reidy**  
(Chairman)

**Edward A. Dragon**  
(Deputy Chairman)

**Robert J. Bigart**

**James E. Blanford**

**Suzanne R. Butler**

**Garber A. Davidson**

**Barbara C. Deinhardt**

**Walter Greenfield**

**Theodore Horoschak**

**Warren R. King**

**Victor B. Olason**

**John H. Rouse**

**Harlan F. Rosacker**

**Jeanne L. Schulz**

**Barry E. Shapiro**

**George A. Wachtenheim**

**Keith L. Wauchope**

As of the date of this report, the Board had two Senior Advisors, Shelley E. Johnson and Joseph J. Pastic. The Support Staff consisted of Conchita M. Spriggs, F. Elena Cahoon, and Carole A. Dolezal. Unless the workload increases, that staffing seems adequate to meet the needs of the Board.

### **Structure of The Board**

The Act which created the Grievance Board was designed to revamp the personnel system within the Foreign Service just as the Civil Service Reform Act (Pub. L. No. 95-454, 92 Stat. 1111 (1978)) aimed to accomplish improvements for the Civil Service personnel system. Congress established this Board to assume an appellate adjudicatory function. Consonant with the objectives of the Foreign Service Act to ensure procedural protections for Foreign Service employees, the Grievance Board must resolve the tensions which sometimes develop between the need to protect employee rights and the desire to enhance Foreign Service efficiency.

The Board operates from a single location, State Annex 15, in Rosslyn, Virginia. Although it may conduct hearings both here and abroad, it was not necessary to conduct any hearings in 2003. Most, yet not all, grievances are adjudicated on a record without an oral hearing. The Board may operate as a whole, through panels, or individual members designated by the Chairman. Currently, the Board functions almost exclusively through panels of three members.

The Secretary of State may remove a Grievance Board member for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform, established at a hearing; no such action has been required in the history of the Grievance Board.

The Chairman has delegated to the Executive Secretary the authority to assign cases to the members for decision. Cases are assigned to panels according to complexity and consistent with the experience, availability, and workload of each member. This system has proven responsive to the needs of all and will continue to be followed. No member is ever assigned a grievance where the assignment may even appear to create a conflict of interest.

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### **Structure of The Board**

The Board obtains facilities, services, and supplies through the administrative services of the Office of the Secretary of State. Expenses of the Grievance Board are paid out of funds appropriated to the Department of State. Necessary support has been willingly and fully provided. Cooperation has been excellent.

Records of the Grievance Board are maintained in-house by the Board and kept separate from all other records of the Department under appropriate safeguards to preserve confidentiality of the grievant. The Board is charged with making every effort, to the extent practicable, to preserve the confidentiality of the grievant or the charged employee in matters brought before it. This requirement is closely adhered to.

Based on its statutory authority, the Grievance Board has issued regulations concerning its procedures. These regulations are set out at 22 CFR § 901 *et seq.*

### **Jurisdiction**

The Board's jurisdiction extends to any grievance, as defined in section 1101 of the Act, and to any separation for cause proceeding initiated pursuant to section 610(a)(2). In determining what is grievable, the legislative history makes clear that this Board is to avoid a narrow interpretation of its jurisdiction. That policy prevails when close questions of jurisdiction are encountered.

While the Act grants broad jurisdiction for grievances of current members, former members have limited grievance rights. A former member, or surviving member of the family of a former member of the Service, may file a grievance only with respect to an alleged denial of an allowance, premium pay, or other financial benefit. Grievances from former members are infrequent.

Most often questions as to jurisdiction are handled at the very outset, for if the Board lacks jurisdiction, it has no power to act. Jurisdictional issues recur regularly. Although the workforce of the Foreign Service agencies consists of a blend of Civil Service and Foreign Service employees, the jurisdiction of the Grievance Board is limited to current and former members of the Foreign Service. Civil Service employees may have recourse to the Merit Systems Protection Board.

The Board has jurisdiction with respect to Labor-Management implementation disputes under FSA § 1014. These disputes have been uncommon. Two such cases were submitted to the Board under this provision in 2002, but were settled/withdrawn. None were submitted in 2003. In addition, the Board hears appeals of claims of overpayment of Foreign Service retirement annuities under 22 CFR Part 17 and certain appeals under the Foreign Service Pension System as specified in FSA § 859. Grievances under these latter two provisions have been rare, but increased slightly in 2003.

**Board  
Decision  
Making**

The principal function of the Board is to provide a forum for the fair review and adjudication of grievance appeals. Its primary responsibility in satisfying that function is to interpret and apply the Act. Many decisions involve the application of our regulations and the interpretation of agency regulations, policies, and procedures known as the Foreign Affairs Manual. In processing grievances, the Board recognizes the need to accommodate the many employees appearing without legal counsel or other representation. Oftentimes they obtain assistance from the American Foreign Service Association (AFSA). Able assistance from AFSA is welcome because that often accelerates case processing while providing the grievant professional help. Regulations and precedent establish the procedural bases for practice before the Board. Federal Court decisions do, of course, have a dramatic impact on Board law. Our decisions are made available to the public, but in excised form, thereby preserving employee confidentiality.

**Remedies**

The remedial power of the Grievance Board is broad. It may, in general, direct the agency to take any corrective action deemed appropriate provided it is not contrary to law or a collective bargaining agreement. See 22 CFR § 908.1. The Board may also award reasonable attorney fees if the grievant is the prevailing party and if warranted in the interest of justice. See 22 CFR § 908.2.

**Research  
Capability and  
Computerization**

The Grievance Board has now instituted its own internet web site: [www.fsgb.gov](http://www.fsgb.gov). This asset now provides state of the art techniques for research. The database consists of cases decided since 1996. The Grievance Board is expanding the database and looking for other ways to use technology to improve operations.

**Judicial  
Review**

Final actions of the Grievance Board are reviewable in the District Courts of the United States. 22 U.S.C. § 4140. Whenever a court reviews a Board decision, the standards of the Administrative Procedure Act, as set forth in Chapter 7 of Title 5, United States Code, apply. Under the Foreign Service Act, 22 U.S.C. § 4140(a):

Any aggrieved party may obtain judicial review of a final action of the Board on any grievance in the district courts of the United States . . . if the request for judicial review is filed not later than 180 days after the final action.

Some significant issues resolved in judicial decisions rendered in 2002 are summarized later in this report.



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### **Foreign Service Grievance Board Cases**

During calendar year 2003, a wide range of important cases were decided by the Board. Those having the most significance are summarized here in random order.

#### **FSGB Case No. 2002-051 (December 5, 2003)**

In this disciplinary action, an employee of the Department of State was charged with various specifications of permitting unauthorized persons to stay at the residence of the Chief of Mission, misuse of an embassy vehicle and misuse of staff resources for the benefit of visiting friends. A 10-day suspension was proposed.

The Board sustained the charges. But the uniqueness of this decision flows from the charge of misuse of a government-owned vehicle. The Board found evidence showing that the charged employee had violated 31 U.S.C. 1349(b) even though the charge brought did not specifically allege a violation of that statute. That law mandates that where the evidence establishes an employee has willfully used or authorized the use of a passenger vehicle owned by the United States Government, except for an official purpose, the employee shall be suspended for at least one month.

This decision held, pointedly, that even where an employee is not directly charged with a violation of 1349(b), the employing agency is obligated to impose the mandatory minimum sentence of 1349(b) if the offense charged and sustained is 'so closely analogous' to the language of that statutory provision.

The violation found met that test. Accordingly, the Board ruled that unless the Department withdrew the misuse of vehicle charge, it was obliged to impose a suspension of at least 30 days.

#### **FSGB Case No. 2003-014 (September 29, 2003)**

Low ranked, grievant insisted that the selection board relied solely on falsely prejudicial language in the Areas For Improvement (AFI) section of the Employee Evaluation Report (EER). The Board found against grievant on the arguments that he had advanced. But the Board was troubled by a matter not raised by grievant to support his appeal, and explained that it "has the authority to decide grievances on the entire record of proceedings, without limiting its dispositions to the issues raised by the parties."

What concerned the Board was that in the "Evaluation of Potential" Section, where it was recommended grievant needed additional experience at the current grade, the rater failed to describe the specific experience needed. Concluding that identification of specific experience was "a mandatory course of action" not followed here, the Board found that this omission was a substantial flaw invalidating the EER.

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**FSGB Case No. 2002-031 (October 23, 2003)**

In this proceeding, grievant contended that improper harassment and other unfair conditions of employment adversely affected her work environment. This grievance was sparked by an investigation conducted by Diplomatic Security in response to an allegation that grievant and her supervisor were engaged in an inappropriate personal relationship and that work was being assigned to grievant to promote her career. The investigation concluded there was a strong likelihood that the relationship had a negative effect on the office and other employees, but there was no finding that work had been shifted to grievant to further her career preferentially.

In a preliminary order, the Board found jurisdiction to the extent that grievant's request for remedy which sought to correct some actual harm or potential harm but dismissed with prejudice all remedy requests in excess of that.

Even though the agency flatly refused to obey a Board order compelling discovery on the grounds that doing so would rekindle the animosity within the office, the Board refused to impose sanctions. Calling the Department's refusal "entirely improper" the Board declined a motion to impose sanctions on the grounds that the information not provided "would not have materially affected the outcome of this appeal." Still, the Board stated that where evidentiary conflicts or uncertainties exist it would resolve those disputes in favor of grievant.

On the merits the Board found the grievance not supported by the preponderant evidence. The Board concluded that grievant's relationship with her supervisor and its somewhat troubling and surreptitious nature was a major contributor to the turmoil in the office about which she complained.

**FSGB Case No. 2003-024 (September 30, 2003)**

Grievant contended that he was awarded a Meritorious Service Increase (MSI) but: (a) he never received the pay increase associated with the award and; (b) because the MSI was not included in his Official Performance File he should be provided with a reconstituted Selection Board to review his prospects for promotion with the MSI included in his file.

The Board determined grievant was not eligible for the pay increase requested because he had received another MSI that same year. No reconstituted Board was ordered because the performance leading to the award was documented in his file and the inclusion of the MSI would not have, in the circumstances, had sufficient weight to raise him from his mid-ranked category to the group of those recommended and reached for promotion.

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### **Foreign Service Grievance Board Cases**

#### **FSGB Case No. 2003-005 (September 11, 2003)**

Grievant was low-ranked by a selection board in 2002. The Employee Evaluation Report (EER), which formed the basis for that low ranking was, asserted grievant, inaccurate and negative in tone and content. He advanced a number of arguments to support his contention but the Board found he failed to carry his burden of proof and denied the grievance appeal. In doing so, two findings warrant mention. Often a grievant will, as here, challenge the accuracy of an EER on the grounds it was tainted owing to a "difficult relationship" or "personality conflict" with the rater. To prevail on this argument the Board made it clear it must be supported by evidence and in this proceeding found nothing to warrant that conclusion.

Also the Board found that when grievant disregarded the normal chain-of-command principles by going over the head of his superiors by communicating directly with the Bureau Director, doing so constituted a grave breach of customary management principles.

#### **FSGB Case No. 2002-053 (September 25, 2003)**

In 2001, the Department of State implemented a new policy, setting higher salary grades and steps for entry-level newly-hired junior officers. Later, the agency decided to make upward adjustments for those untenured employees hired under the old guidelines whose credentials at the time they were hired would have justified higher entering salaries had they been hired under the new policy. Grievants, supported by AFSA, maintained that in their cases – and perhaps in others as well – the agency's effort to rectify the disparity in salaries fell short of doing so.

The decision of the Board noted that grievants did not allege any violations of law, regulation, policy, or provisions of a collective bargaining agreement with respect to the classes to which they were assigned upon their initial appointments. They did, however, object that in implementing the new policy, the agency failed to recognize and give credit for experience gained between their original appointments and implementation of the adjustment plan; failed to use available mechanisms for obtaining authority to advance the grievants within class to the appropriate salary step; and failed to properly apply the two-steps-upon-promotion rule when the grievants attain promotions on merit from FS-04 to FS-03. More broadly, grievants claimed that the agency's actions violated the merit principles set out in 5 U.S.C. 2301(b), and section 105 of the Foreign Service Act.

The Board found that the agency did not violate any law, regulation, policy, or collective bargaining agreement in its proposed salary adjustment plan, and absent a finding of agency error it did not award promotions or step increases as grievants requested.

In denying the appeal, the Board explained that the procedural change was clearly within the authority of the Department as a "normal part of managing its human resources."

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**FSGB Case No. 2001-019 (February 27, 2003)**

Here the Board remanded an issue to the Department for its consideration, using its regulatory discretion to do so when there has been no agency decision. Grievant had argued that the Board should rule without remand because no new facts need be developed. The Board concluded the agency could decide the issue with case possibly obviating a need for any further action.

**In FSGB Case No. 2002-041 (January 16, 2003)**

Grievant withdrew his compulsory retirement contributions for his period of service from 1987-1990 when he voluntarily resigned from the Foreign Service. He rejoined the Foreign Service in 1992. In 2001 he learned that having obtained the refund of his retirement benefits for the 1987-1990 time period that his earlier stint would not be credited toward retirement. He grieved that conclusion to us. We found that his request to repay the amount of the refund and review that period of service as creditable was barred by law.

**FSGB Case No. 2002-033 (February 11, 2003)**

This grievance involved a modern day issue: use of a government-owned computer to access pornographic images and sexually-oriented internet sites.

Grievant admitted having used the Government-owned laptop in the evening in his hotel room to access pornography. The agency suspended grievant for 10 days based upon several charges including computer misuse. The Board determined that the agency had not established by a preponderance of the evidence that grievant's actions were prohibited by the policy statements on which the agency based those charges. The Board found that those policy statements linked the prohibitions on the use of agency computers to access sexually explicit material to the inappropriateness of that material in the workplace, where it might cause offense to co-workers or members of the public. In this case, all of grievant's access occurred during off-duty hours and away from the workplace; no co-workers or members of the public were present. Furthermore, all of his access was achieved through a personal internet account for which he paid himself, so the access resulted in no cost to the government, and he was not identifiable to any of the internet sites he visited as an agency employee.

The Board also determined that the agency had offered little or no explanation of how grievant's use of the laptop to access sexually explicit internet sites constituted improper personal conduct. To the extent the agency based its assertion that these actions were improper because grievant had used a government-owned computer, it merely bootstrapped Charge 1 into a separate charge, one that we did not sustain for reasons already stated. To the extent the agency may have perceived that the subject matter of grievant's access evidenced improper personal conduct, we found the mere assertion of this perception without explanation was insufficient. We noted that the agency did not claim that any of the areas of concern mentioned in the agency's own regulations on sexual activity, at 3FAM 4139.1, were present in this case.

The Board sustained the grievance in its entirety and directed the rescission of the agency suspension action.

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**FSGB Case No. 2001-024 (January 2, 2003)**

The agency sought to discipline an employee who while driving his vehicle struck a pedestrian on a public street overseas. The employee did not stop or render assistance nor even report the incident until the following day. The pedestrian died.

The Board sustained the charge – which was essentially a violation of local laws – and did not disturb the 60-day suspension imposed. We found grievant displayed a “callous indifference” in making no effort to stop or even report the incident “promptly” as required.

Recognizing that there may have been a personal danger to grievant were a hostile crowd to gather near the accident, we found no reason why the employee could not at least render assistance by notifying appropriate authorities as both local law and post policy required.

**FSGB Case No. 2000-087 (April 10, 2003)**

This decision involved a request for attorney fees. Its significance derives from the finding that an award was granted as in the interest of justice based upon the gross procedural errors of the Department of State. This particular basis to support an award is infrequent. The Board found that although the procedural errors committed by the agency were not the product of willful disregard of established procedure nor of animus or bias, the harm to grievant was sufficiently serious to warrant a finding the procedural errors were gross.

**FSGB Case No. 2002-040 (May 28, 2003)**

This grievance involved the 2002 performance evaluation of grievant, an untenured officer whose 2002 evaluation report convinced the Performance Board (PB) and Performance Standards Board (PSB), that he did not meet the skill standards of his class. When the agency decided to separate him, grievant maintained that the boards violated their regulations and precepts by placing him in category “C” which resulted in his separation. In addition, grievant asserted that he was deprived of an opportunity to correct the deficiencies identified by the PSB because he was not notified in advance of deficiencies in any skill area as required by the agency’s Employee Evaluation Program. The agency insisted grievant was improperly contesting the judgment of a selection board and that grievant had not shown credible evidence that the PSB violated its regulations or precepts.

The Grievance Board found that grievant had established through a preponderance of the evidence that the agency violated its regulations, *inter alia* ADS 462.3.3.2, by not notifying him of a skill deficiency in time for him to take corrective action. That error was substantive, not merely procedural, in nature. Thus it was found to be a substantial factor in the agency action adverse to the employee, and the Board directed the agency to rescind the separation action and to reinstate grievant.

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The importance of this decision is the Board's holding that:

- The agency must give [grievant] a reasonable opportunity to demonstrate acceptable performance before being separated because that right is an important aspect of a valid performance appraisal system.
- The position of the agency appears especially weak in light of the holding in *Obasiolu v. Brian Atwood, et al.*, (C.A. No. 98-2978 (ESH) D.D.C. filed August 2, 2000). There the Court made clear its view that the regulations concerning the need for counseling about a deficiency must be followed.

FSGB Case No. 2002-037 (July 8, 2003) was a somewhat unique case in that it dealt with a proposal by the Department of State to discipline a current employee of the Department for alleged misconduct while an employee of the American Institute in Taiwan (AIT). Grievant insisted that the agency lacked authority to punish him while at AIT because 22 U.S.C. 3310 specifies that an employee of the United States Government must be separated from the Service before being employed by that organization, a private institution.

The Board held that while at AIT grievant was no longer a member of the Foreign Service, even though he was eligible for reinstatement upon completion of that tour. Also, noted the Board, his employment contract provided that grievant agreed to abide by regulations relating to ethical conduct and that any failure to abide would permit the Institute to pursue any remedies it has against grievant for breach of these conditions. AIT, not the Department, held the right to impose discipline on grievant.

### **FSGB Case No. 2000-045 (June 19, 2003)**

A decision on remand where the Court specifically directed that the Board shall "determine whether the agency can show, by a preponderance of the evidence, that it would have removed (grievant) from the Foreign Service, absent the procedural error caused by the agency's failure to provide [Grievant] with performance counseling." Grievant had been separated from the Foreign Service based upon what the Court found was the incorrect assumption of the Foreign Service Grievance Board that grievant "had been informally counseled when the record showed he had not, and then applied an incorrect standard to determine whether the prejudicial error prejudiced the grievant."

On remand, the Board found that the:

- Department has shown by the preponderant evidence that it would have designated grievant for selection out notwithstanding the procedural error found by the Court.
- That finding was based upon a detailed analysis of grievant's EER which revealed, in the words of the decision "a resounding undercurrent of his performance and conduct." Additionally, the Board found grievant's actions:

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- Demonstrate a serious deficiency in the interpersonal, intellectual and managerial skills that are expected of even Junior Officers.
- Most damning was the conclusion that grievant was unable to control his temper and engaged in "disruptive and abusive" behavior.
- Grievant has again resorted to the United States District Court for relief. A decision pends.

**Summary of  
Significant  
Court  
Decisions  
During 2003**

*Lon C. Fairchild v. U. S. Department of State, et al.,*  
Civil Action No. 02-0147(JR), (D.D.C. filed October 16, 2003).

Fairchild challenged a Board ruling upholding the decision of the Department to suspend him for five days after the agency determined he had improperly claimed and received payments for separate maintenance allowance. The Court easily rejected, as did the Board, Fairchild's argument that he was entitled to the allowance which allowed him to apply because of "special needs or hardship."

As a part of this decision the Court upheld our oft-cited proposition that employees are responsible for knowledge of their agencies' regulations as those regulations pertain to them. Not infrequently employees defend their actions - or even inactions - on the grounds the agency failed to make them aware of their obligations or rights. This decision further fastens our precedent.

Also in *Fairchild*, the Court mentioned:

*"Because the Board has expertise in applying the Department's personnel regulations . . . its decisions are reviewable under the arbitrary and capricious standard."*

*William E. Shea v. Colin Powell,*  
Civil Action No. 02-0577 (JR) (D.D.C. filed October 31, 2003)

This case presented sweeping claims of employment discrimination based on race and ethnicity and invoked Title VII of the Civil Rights Act of 1964 and the Fifth Amendment of the U. S. Constitution. Tried before the Court were the following allegations of discrimination: (1) continuing lower pay and benefits as a result of initial placement in a lower pay grade in 1992; and (2) the requirement that grievant Shea take race and ethnicity in to consideration in how he treats his subordinates in order to advance diversity. What is more, Shea sought a declaration that those statutes and Executive Orders authorizing race-and ethnicity-conscious action to achieve diversity are unlawful as violative of Title VII and the Constitution.

In his grievance before the Board, Shea had pressed upon us an exhaustive allegation about the discriminatory practices and policies of the Department. Interestingly the Court found no reason to plumb the depths of those assertions or ventilate these issues as presented. Instead it handled the issues as follows:

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### **Summary of Significant Court Decisions During 2003**

1. Continuing lower pay and benefits. Shea's claim of continuing lower pay and benefits was dismissed because the allegedly discriminatory act - the assignment of a pay grade two levels below that similarly qualified minority hires - did not occur within the period covered by his administrative complaint.
2. Racial discrimination. The claim by Shea that he and his subordinates are "require[d] to take race into consideration in personnel decision making," in violation of both his and his subordinates' rights pursuant to the Fifth Amendment, Title VII and the Foreign Service Act, was dismissed because he conceded that "no adverse action [was] alleged." On this matter the Court relied upon *Brown v. Brody*, 199 F.3d 446, 455 (D.C. Cir. 1999) (holding that in Title VII cases, "there must still be some kind of injury for a federal employee to state a claim.")
3. Declaratory and injunctive relief. Even if he had suffered no adverse employment action, Shea contended that his allegation that his race and ethnicity would be considered in personnel actions was an appropriate subject for a declaratory and injunctive relief now, before the constitutional violation occurs. Inasmuch as Shea failed to identify injury, or even prospective injury to himself, the Court found he failed to establish that there was a case or controversy that is a prerequisite of declaratory relief. Added the Court: "the Constitution does not provide an independent basis for employment discrimination otherwise cognizable under Title VII." The Court identified Title VII as a sole means of litigating such grievances, citing *Wagner v. Taylor*, 836 F.2d 566, 576 n. 76 (D.C. Cir. 1987).

Pending in Federal District Court is an agency appeal from our decision in **FSGB No. 2001-034 (January 27, 2003)**. There we reversed the agency decision to separate grievant for failure to meet the standards of performance of his class.

Grievant appealed the agency's decision to separate him, arguing that the Performance Standards Board primarily based its determination on an Employee Evaluation Report that was falsely prejudicial because his cited misbehavior was the result of an underlying psychiatric illness erroneously regarded as poor performance. He claimed further that M/MED violated regulations by approving his assignment to an unusually stressful post, by failing to ensure he received treatment or transfer to a less stressful assignment, and by permitting his Reviewing Officer to include a damaging statement by someone who was not the reviewer.

The Board determined that the grievant had not shown through a preponderance of the evidence that the agency violated its regulations. The Board then reviewed *diametrically opposed opinions of an agency psychiatrist who found no psychiatric disorder* and the grievant's private psychiatrist who diagnosed Obsessive Compulsive Disorder (OCD) and Acute Adjustment Disorder (AAD).

The Board referred to MSPB guidelines for evaluation medical evidence found in *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 423 (1981). Comparing such factors as whether the opinion was based on a medical examination, whether the opinion provided a reasoned explanation for its findings, the qualifications of the expert rendering the opinion, and the extent and duration of the expert's familiarity with or treatment of the applicant's condition, the Board found that the grievant had shown through a preponderance of the evidence that his psychiatrist's opinion was entitled to controlling weight and that grievant suffered from undetected and untreated OCD and



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AAD that seriously and adversely affected his performance during the period covered by his 2000 EER. Board precedents (FSGB Case No. 98-53 and FSGB Case No. 89-91) were relied upon to support grievant's claim that an EER is invalid if it describes a poor performance that was the result of an acute illness. The M/MED Director described as "true in general" the statement: "An EER for performance during a treatable illness cannot provide a fair basis for personnel review." Accordingly, the Board directed the agency to expunge the 2000 EER, the 2000 low ranking and 2000 referral to the PSB and the designation for selection out, and to rescind the grievant's proposed separation from the Service.

But that decision was not unanimous. A dissenting member, noting that there was conflicting testimony by medical experts, was unwilling to accept the contradictory evidence presented by a private medical professional over that adduced by a licensed professional psychiatrist hired by the Department of State. Faced with dueling psychiatrists and diagnoses, the dissenter opined that grievant did not meet this burden of establishing that his 2000 EER was falsely prejudicial because it describes a poor performance that was the result of a treatable psychiatric illness. He notes grievant challenges only the 2000 EER and points out evidence that grievant concedes that he was not suffering from a disabling mental illness at the time of his assignment and that he is not suffering from a disabling mental illness now. The record shows that grievant was low ranked by the 1996, 1998, 1999, and 2000 SBs. With this background he felt that the 2000 PSB permissibly detected a pattern of validly demonstrated deficiencies through the years that could be traced back to grievant's first EER in 1991/1992.

***Felix S. Bloch v. Colin L. Powell, No. 02-5311***  
348 F.3d 1060 (D.C. Cir. 2003)

Appellant was a member of the Senior Foreign Service when he resigned in 1990, after the Department of State initiated proceedings to remove him from the Service on national security grounds. When Bloch sought an immediate annuity the Department notified him that the Secretary of State had decided to withhold consent to his request for voluntary retirement and receipt of an immediate annuity based upon his authority to do so under 22 U.S.C. § 4051, as amended. Bloch then withdrew his compulsory retirement contributions already made to the Foreign Service Retirement and Disability System.

In his grievance, Bloch argued that the Secretary lacked discretion to withhold his immediate annuity and that denial thereof constituted a deprivation of property without due process of law. Also, he contended that his withdrawal of retirement contributions cannot be construed as a waiver of his right to a deferred annuity because the Department did not inform him at that time that a deferred annuity was an available option.

We held against the grievant on all issues and the District Court found our decision was not arbitrary or capricious. The Court of Appeals affirmed.

Among the significant findings of the court was the comment about the relevant statute:

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"The statute is perhaps a paradigmatic vesting of unfettered discretion, placing no restraints on the Secretary's authority to withhold consent . . . ."

The effect of this was a clear affirmance of the fundamental holding of this Board.

The Court found unavailing Bloch's argument that in not consenting to his immediate annuity request the Secretary deprived him of property without due process of law. It held first that Bloch must show that the interest he asserts is a constitutionally protected interest. It ruled that he had not presented a persuasive argument on this point and, relying on precedent, held that:

When a statute leaves a benefit to the discretion of a government official, no protected property interest in that benefit can arise.

The decision also contains a useful discussion of the annuity provisions applicable to foreign service members.

Noteworthy, too, in the decision is the comment of the Court about the content of the Board's decision. The Court praised our reasoning as "more than sufficient"; adequately differentiated precedent relied upon by Bloch and, was overall, worthy of affirmance.

# FOREIGN SERVICE GRIEVANCE BOARD

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## **Case Statistics 2003**

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**A. Number of Cases Filed** ..... 49

**B. Types of Cases Filed**

EER	.....	21
Financial	.....	10
Disability	.....	0
Discipline	.....	7
Separation	.....	6
Jurisdiction	.....	0
Assignment	.....	5
Implementation	.....	0

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**C. Disposition of 2003 Cases**

Affirmed	.....	8
Reversed	.....	1
Partially Reversed	.....	0
Settled	.....	2
Withdrawn	.....	4
Dismissed	.....	0
Pending (as of 12/31/2002)	.....	34

**D. Oral Hearings** ..... NONE

**E. Interim Relief** ..... 8

# FOREIGN SERVICE GRIEVANCE BOARD

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## **Case Statistics 2003**

### **F. All Cases Closed in 2003 (Including Prior Year Cases)**

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Total	44
Affirmed	26
Reversed	6
Partially Reversed	2
Settled	4
Withdrawn	6
Dismissed	0

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The average time from filing to resolution was a total of 48 weeks, an increase from the 43-week average in 2002. The longest time between filing and resolution was 338 weeks. The shortest was 3 weeks.

Two long-standing FLSA cases were resolved in 2003. The resolution of these cases tends to distort the statistics. Excluding these two cases, the average time from filing to resolution was 35 weeks, a substantial decrease from the 43-week average in 2002. The longest time between filing and resolution was 98 weeks, significantly less than the 175 weeks in 2002.

As of December 31, 2003, there were 43 cases pending before the Board. The oldest undecided case was pending 87 weeks as of December 31, 2003.